



July, 13, 2012

MEMORANDUM TO MUNICIPAL CLIENTS

TO: BOARD OF SELECTMEN/MAYOR/TOWN AND CITY COUNCIL
TOWN MANAGER/TOWN ADMINISTRATOR/EXECUTIVE SECRETARY

Re: Open Meeting Law – Remote Participation and “Intentional Violations”

The Attorney General’s Division of Open Government (“Division”) recently issued amended regulations on both remote participation and the definition of an “intentional violation,” and public bodies subject to the Open Meeting Law should be aware of these developments.

Remote Participation

When the new Open Meeting Law, G.L. c.30A, §§18-25, was enacted in 2010, it did not specifically authorize remote participation in meetings by members of a governmental body, such as via telephone or video conference. However, the Law provided that the Attorney General could authorize remote participation by letter ruling or regulation. In November 2011, the Division released regulations on the subject, and these were further amended in May of this year. The regulation, 940 CMR 29.10, may be accessed on the Division website at <http://www.mass.gov/ago/governmentresources/open-meeting-law/940-cmr-2900.html>.

The primary provisions of the regulation are as follows:

- Authorization – The “chief executive officer” must authorize use of remote participation before it can be used by a municipality’s public bodies. General Laws Chapter 4, §7 defines the term “chief executive officer” as the mayor in a city and the board of selectmen in a town, unless a different chief executive officer has been designated by charter or special act. Once authorized, remote participation will be available to all boards and committees subject to the Open Meeting Law. The chief executive officer may also decide to revoke such authorization.

Note: On May 24, 2012, the Division issued an emergency regulation that is currently in effect. The emergency regulation clarifies that Mayors and Boards of Selectmen have sole authority to: (1) authorize remote participation; and (2) impose additional local regulations that will apply uniformly to all city or town public bodies. For example, if a Board of Selectmen approves remote participation under particular conditions, another board cannot have its own remote participation policy establishing different conditions. The Division allowed one variation from this, in that a Mayor or Board of Selectmen may adopt, as part of their own municipality-wide policy, a provision that allows an individual board or

Memorandum to Municipal Clients

Page 2

commission to “opt out” – i.e., to decide against using remote participation at all. Any local regulations must be consistent with state law.

- Media – “[T]elephone, internet, or satellite enabled audio or video conferencing” may be used for remote participation, or other technology may be used provided that the participant and all in attendance can hear each other. If videoconferencing is used, the member participating remotely must also be visible to all in attendance.
- Quorum Requirements – A quorum of the public body must be physically present at the meeting location before an absent member may participate remotely.
- Votes – If any member of a public body is participating remotely, all votes of the body, including those taken in open session, are required to be by roll call and the results of the roll call must be recorded in the minutes.
- Status – A member participating remotely may vote, and is not deemed to be “absent” from the meeting, including for purposes of G.L. c.39, §23D (a local acceptance statute that allows a board member to be “absent” from one session of a public hearing and still participate and vote, subject to certain conditions).
- Reasons – Acceptable reasons for participating remotely include one or more of the following: personal illness, personal disability, emergency, military service or geographic distance. In other words, a member cannot participate remotely only for convenience.
- Notification – A member who will not be present at a meeting must notify the chair as far in advance as possible. The chair must announce at the beginning of the meeting the name of the person participating remotely and the reason. The categories listed above may be used for this announcement, and particular private details should be avoided (i.e., use the words “personal illness” as compared to “she has the flu,” or use “geographic distance” as compared to “she is in Alaska visiting relatives”). It is important to protect a member’s privacy rights with respect to illness or disability.
- Technical Issues - If technical difficulties arise with the media connection, the chair must decide how to address them. The Division encourages suspension of deliberations while the difficulties are addressed. If the remote member is disconnected during the meeting, the minutes must reflect this fact.
- Executive Session - A member participating remotely may participate in an executive session, but the member must state for the record that he or she is alone and cannot be overheard. Alternatively, another person may be present with the member participating remotely if the public body votes to authorize it.

Memorandum to Municipal Clients
Page 3

Any public body utilizing remote participation is required to comply with all provisions of 940 CMR 29.10, summarized above, as well as the other requirements of the Open Meeting Law and all of the Division's regulations.

Intentional Violations

When the Open Meeting Law was revised in 2010, it included various enforcement methods that the Division may employ, including severe actions that may be taken if the Division determines that the violation was "intentional." The term is defined in the regulations at 940 CMR 29.02, but the Division is in the process of revising the definition this summer. While this term includes actions by a board or board member with the specific intent to violate the Open Meeting Law, or with "deliberate ignorance" of the Law's requirements, the Division's proposed regulation also includes situations where a body has been warned once by the Division that certain actions are in violation, and the body then repeats that action. When the Division issues a written determination in response to a citizen's complaint and includes such a warning, the Division now includes a statement that "future similar violations may be considered evidence of intent to violate the law." If a public body receives a determination from the Division with a caution not to take certain action in the future, it is important that all members understand the determination so that members can avoid inadvertently doing something that might be treated as intentional by the Division.

Very truly yours,

A handwritten signature in black ink, appearing to read "B. Riley", written over a horizontal line.

Brian W. Riley